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BRITISH COLUMBIA

OPINION

OF THE CONFLICT OF INTEREST COMMISIONER PURSUANT TO SECTION 19(1) OF THE *MEMBERS' CONFLICT OF INTEREST ACT*

IN THE MATTER OF AN APPLICATION BY JOY MACPHAIL, MEMBER OF THE LEGISLATIVE ASSEMBLY FOR VANCOUVER-HASTINGS AND LEADER OF THE OPPOSITION, WITH RESPECT TO ALLEGED CONTRAVENTION OF PROVISIONS OF THE *MEMBERS' CONFLICT OF INTEREST ACT* BY THE HONOURABLE SINDI HAWKINS, MEMBER OF THE LEGISLATIVE ASSEMBLY FOR KELOWNA-MISSION AND MINISTER OF HEALTH PLANNING

City of Victoria
Province of British Columbia

February 28, 2002

Office of the Conflict of Interest Commissioner

The Honourable H. A. D. Oliver, Q.C.
Commissioner

Mailing Address:
101 - 431 Menzies Street
Victoria BC V8V 1X4

Telephone: (250) 356-9283
Facsimile: (250) 356-6580

IN THE MATTER OF AN APPLICATION BY JOY MACPHAIL, MEMBER OF THE LEGISLATIVE ASSEMBLY FOR VANCOUVER-HASTINGS AND LEADER OF THE OPPOSITION, WITH RESPECT TO ALLEGED CONTRAVENTION OF PROVISIONS OF THE *MEMBERS' CONFLICT OF INTEREST ACT* BY THE HONOURABLE SINDI HAWKINS, MEMBER OF THE LEGISLATIVE ASSEMBLY FOR KELOWNA-MISSION AND MINISTER OF HEALTH PLANNING

REQUEST

Joy MacPhail, MLA for Vancouver-Hastings and Leader of the Opposition, has stated by a letter to me dated February 14, 2002 that she believes that there are reasonable and probable grounds to believe that the Member for Kelowna Mission has violated Section 3 of the *Members' Conflict of Interest Act* in that she exercised an official power and performed an official duty or function while she was in a conflict of interest or, at a minimum, in an apparent conflict of interest and has requested that I conduct an inquiry into this matter and report my findings to the Legislature pursuant to Sections 21(1) and 21(3) of the Act.

The Act provides as follows:

> 19 (1) A member who has reasonable and probable grounds to believe that another member is in contravention of this Act or of section 25 of the *Constitution Act* may, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of this Act.
>
> 21 (3) If the request for an opinion is made under section 19 (1), the commissioner must report his or her opinion to the Speaker of the Legislative Assembly who must cause the report to be laid before the Legislative Assembly if it is in

> session or, if not in session, to the Clerk of the Legislative Assembly who must send a copy of it to all members of the Legislative Assembly.

I accordingly interpret Ms. MacPhail's letter as a request pursuant to Section 19(1) that I give an opinion respecting the compliance of the Minister with the provisions of the Act.

PROCEDURE

I must first determine whether this is a matter falling within my jurisdiction under the *Members' Conflict of Interest Act*. Once that has been established, after a preliminary assessment of the allegation and available facts, I may conduct an investigation or, on giving the Member concerned reasonable notice, an inquiry. Experience has shown that an inquiry generally involves the retaining of Commission counsel and of court reporters and is normally attended by considerable delay frequently occasioned by prior court commitments of counsel for the Member involved and for various witnesses. It is a slow procedure, generally necessitating the expenditure of substantial public funds. It has been the general practice both of my predecessor, Commissioner Hughes, and myself to conduct the operations of this Office of Conflict of Interest at minimum expense to the taxpayer. For these reasons, the numerous matters with which the Commissioner has to deal ought, in my view, to be handled as investigations wherever possible with an inquiry only being embarked upon when that course appears essential. The facts alleged by the applicant did not appear to justify the delay and expense of a formal inquiry and could, in my judgment, be properly dealt with as an investigation (which may always, if that becomes appropriate, be converted into an inquiry at any stage).

Investigation

Following the preliminary assessment and having assembled the requisite background information I have embarked on an investigation.

Interviews

I have interviewed and discussed the issues with the following individuals:

- The Honourable Sindi Hawkins, MLA (Kelowna-Mission), Minister of Health Planning
- Steve Greenaway, Greenaway Communications, Kelowna, B.C.
- Dr. Penny Ballem, Deputy Minister of Health Planning
- Joy MacPhail, MLA (Vancouver-Hastings)
- The Honourable Gordon Campbell, Premier

Review of Supporting Documentation

In the course of my preliminary assessment, I have reviewed the following documents:

- Contract with Greenaway & Associates dated January 16, 2002
- Invoice from Greenaway & Associates Communications dated January 23, 2001 (sic)
- A summary of the contract work done by Greenaway & Associates
- Invoice from Greenaway Thompson Communications for BCAL work dated February 22, 2000
- Draft 1 of Cabinet Submission dated December 3, 2001 (prepared by Ministry)
- Draft 2 of Cabinet Submission dated December 5, 2001 (prepared by Ministry)

- Draft 3 of Cabinet Submission dated December 5, 2001 (prepared by Ministry)
- Draft 4 of Cabinet Submission dated December 6, 2001
- A second copy of Draft 4 with changes from meeting at Premier's Office
- Changes to Presentation dated December 7, 2001 (prepared by Ministry)
- Greenaway & Associates Communications Draft 1 dated December 8, 2001
- Greenaway & Associates Communications Draft 2 dated December 10, 2001
- Final Cabinet Submission prepared by Greenaway & Associates dated December 12, 2001
- Electronic Mail from Deputy Minister Ballem to Ministry staff dated February 15, 2002
- Government Management Operating Policy Section 6 (3) in reference to guidelines and policies that govern relationships between Government Contractors and Government

BACKGROUND

In December of 2001, the Minister for Health and Planning, the Honourable Sindi Hawkins, engaged a communications firm in her constituency, Greenaway & Associates Communications Ltd. ("Greenaway & Associates") to facilitate a revision of material for an open Cabinet meeting on the restructuring of the health regions in the Province of British Columbia. Ms. MacPhail alleges a violation of Section 3 of the Act based on the fact that Mr. Greenaway had been a campaign worker, financial contributor and was a personal friend of Minister Hawkins and it was alleged that comparable work could have been performed by staff within her Ministry.

The relevant provisions of the Act are:

2 (1) For the purposes of this Act, a member has a conflict of interest when the member exercises and official power or performs an official duty or function in the execution of his or her office and at the same time knows that in the performance of the duty of function or in the exercise of the power there is the opportunity to further his or her private interest.

2 (2) For the purposes of the Act, a member has an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest.

3 A member must not exercise an official power or perform an official duty or function if the member has a conflict of interest or an apparent conflict of interest.

19 (1) A member who has reasonable and probable grounds to believe that another member is in contravention of the Act or of section 25 of the *Constitution Act* may, by application in writing setting out the grounds for the belief and the nature of the contravention alleged, request that the commissioner give an opinion respecting the compliance of the other member with the provisions of this Act.

HISTORY

Greenaway & Associates

The Minister has known Mr. Steve Greenaway for approximately six years. She first met Mr. Greenaway when she (or her husband), approached him to work on her first election campaign. Mr. Greenaway was paid for the work which he performed on advertising for her first campaign. Mr. Greenaway views Ms. Hawkins as a friend in its broadest of terms – having worked together and having occasionally attended the same social gatherings. Mr. Greenaway has worked with such politicians as the Rt. Hon. Kim Campbell, Rt. Hon. Joe Clark and the

Hon. Brian Smith. Mr. Greenaway volunteered his time on the Minister's second campaign in the 2001 election by working on speeches and advertisements.

Since 1997, Mr. Greenaway has made financial contributions to the Liberal Party totaling $1,980.00. He states that neither he nor his firm made any direct monetary donations to Sindi Hawkins or her party and any donations would have been made in the form of a ticket purchase to fund-raising dinners or similar events.

Mr. Greenaway states that he, through a company of his, made minor financial contributions to the New Democratic Party on one or two occasions (although this is questioned by Ms. MacPhail) and performed consulting work for the previous Government of an estimated value of approximately $100,000.00. It seems to me that the question of Mr. Greenaway's relations with other political figures and parties is relevant only as part of the general background.

The Minister's request for assistance from Mr. Greenaway must be considered in the context of a series of events which culminated in the open Cabinet meeting of December 12, 2001.

Events Culminating in the Greenaway Contract

Within approximately one month of the election last May, the new government terminated the Director of Communications in the Health Ministry and an acting director was established in the position. Issues continued to prevail surrounding the material created and produced by the Communications Division.

In November of the same year, the Minister presented the proposal on "Restructuring Health Regions", a significant multi-billion dollar restructuring plan to Cabinet. The restructuring plans were adopted at the meeting. Minister Hawkins would present her restructuring plan for decision at an open Cabinet meeting to be held on December 5, 2001.

It was established between the Minister and the Assistant Deputy Minister for Health Planning, Ms. Anne McFarlane, that there would be three significant speeches in the coming months to apprise the public of the work being done within the Ministry. Given the issues surrounding the Communications Division, Ms. McFarlane asked the Minister for advice on external communications consultants who she thought would be competent to write the speeches. The Minister did not provide any names at that time.

Mr. Bert Boyd was the head of the Implementation Team for restructuring health regions. Mr. Boyd was responsible for overseeing preparation of the Cabinet submission and the implementation plan.

Sometime during the week of November 25, 2001, the decision was made to defer the announcement of restructuring of the health regions to December 12, 2001 as the communications strategies for the labor initiatives were occupying a considerable amount of time. The Minister was heavily involved in review of the draft legislation and working on the communications plans for the labor strategies. This was an inflexible date and could not be altered without considerable expense and management reorganization.

During the week of November 23, 2001, Ministerial Assistant Cynthia Haraldsen telephoned Mr. Boyd several times for a status report on the Cabinet submission and the implementation plan. On December 1, 2001 Ms. Haraldsen again impressed upon Mr. Boyd the need to provide the Minister with a working draft of the Cabinet submission. The Minister and her assistant were anxious, as the open Cabinet meeting was less than two weeks away.

Over a period of approximately five days (December 3 through December 7), a draft submission followed by a series of amended drafts were prepared by Communications Division, none of which were considered acceptable.

On Friday, December 7, 2001 the Minister was in Vancouver for an unrelated meeting. She left Vancouver at noon to fly to Kelowna and arrived in her constituency office at approximately 2:00 p.m. The definitive submission on the Restructuring of Health Regions had yet to be completed for the Cabinet meeting. The deadline for filing the Cabinet submission was noon on the following Monday. Minister Hawkins was alone in Kelowna without staff, facing the prospect of redrafting the Cabinet submission over the weekend without any knowledge of "Powerpoint", the software facility that was being used for the submission. The Minister first contacted Mr. Greenaway at approximately 3:00 or 4:00 p.m. in anticipation that she ***might*** require some help. Mr. Greenaway assured the Minister that he could assist her on this particular form of submission and, if necessary, could change his weekend plans to accommodate the task.

Ms. Haraldson telephoned the Minister at approximately 4:45 p.m. on Friday afternoon to advise her that the Cabinet submission had arrived. The Ministerial Assistant advised the Minister that

Dave Cunningham, the Deputy Director of Communications in the Premier's Office, was already on the telephone with the Deputy Minister in the Premier's Office concerning the submission. A faxed draft was sent to her constituency office. She reviewed the revised draft and concluded that it was still not in a form that was ready for presentation at the open Cabinet meeting the following week.

With this Monday deadline, Minister Hawkins called Mr. Greenaway again and enlisted his assistance.

The Minister and Mr. Greenaway worked on the draft submission in Kelowna over the weekend of December 8, 2001. The Deputy Minister and Mr. Boyd also worked on the weekend to help the Minister and Mr. Greenaway complete and finalize the revisions to the submission. While the initial "groundwork" had been done by the Ministry, Mr. Greenaway generated two further drafts before completing a final version which was filed in the Cabinet binder on Monday, December 10, 2001.

There was no discussion of an hourly rate or a contract with Mr. Greenaway during either telephone conversation.

The Minister directed her Deputy Minister to arrange a contract but did not herself discuss hourly rates or a contract ceiling with Dr. Ballem.

Ministry staff consequently prepared a contract for Greenaway & Associates for a four month period at an hourly rate of $125.00 with a ceiling of $20,000.00 to cover the work on the Cabinet submission and speeches.

This was $25.00 per hour less than the maximum rate which Mr. Greenaway had charged the former government for consultation work.

Mr. Greenaway continued working on the speeches in consultation with Ministry staff.

The Minister explains that she contacted Mr. Greenaway's firm out of the four firms in Kelowna which currently provide communications consultation because:

a) she trusted the high quality of Mr. Greenaway's work which she was familiar with from working with him previously;
b) she knew he was familiar with the governments "New Era" policies;
c) she was aware that he had worked for other Members of Parliament, Prime Ministers and a provincial Attorney General and was familiar with the proper handling of highly sensitive Cabinet material;
d) she knew that she could trust Mr. Greenaway with the highly sensitive and confidential material contained in the draft submission;
e) she knew that he could be counted on to produce the necessary revisions by the end of the weekend;
f) Greenaway & Associates were geographically located to provide the assistance.

GOVERNMENT POLICY ON ISSUANCE OF CONTRACTS

The policy does not have statutory effect. The policy only requires a competitive bid process for contracts over $25,000.00. Competitive bids are not required for contracts for lesser amounts. (It should also be noted that the Ministry may, on contracts over $25,000.00, depart from the policy where:

- An unforeseeable emergency exists and the services could not be obtained in time by means of a competitive process;
- The services to be purchased are of a confidential or privileged nature and disclosure of these matters through an open bidding process could reasonably be expected to compromise government confidentiality, cause economic disruption or otherwise be contrary to the public interest.)

OPINION

This is my Opinion prepared pursuant to Section 21(3) of the Act at the request of Joy MacPhail, Member of the Legislative Assembly of British Columbia and Leader of the Opposition.

The *Blencoe* Opinion

In her request, Ms. MacPhail has, quite properly, drawn my attention to the Decision of Commissioner Hughes in his Opinion involving alleged contraventions of the Act by the

Honourable Robin Blencoe, then Minister of Municipal Affairs, Recreation and Housing. That Opinion is significant for two main reasons:

1. In interpreting the meaning of the statute and the intent of the Legislature in defining the term "private interest", Commissioner Hughes, after reviewing the law and considering the submissions of counsel, decided to depart from the common law rule which had existed in England since the 1600's and which essentially limited the meaning of that term to "pecuniary interest" and said the following:

> "In the absence of an exhaustive definition of the phase "private interest" in the *Members' Conflict of Interest Act* as it appears in our statute of the 1990's, I decline to interpret it in the manner formulated four centuries ago. I believe it has to be interpreted in the climate in which it was enacted. I believe that climate to be as expressed in the passages of Hansard from which I have quoted. That leads to a definition that is not limited to pecuniary or financial interests. It was open to the Legislature to have placed words of limitation on "private interest". It did not do so.
>
> IV WHAT CONSTITUTES A PRIVATE INTEREST?
>
> With that background, I will now attempt to provide some greater content to what I understand the phrase "private interest" includes.
>
> As stated above, private interest certainly includes any pecuniary interest or economic advantage. The pecuniary interest can be for even a small amount so long as it is not de minimis. Whether the pecuniary interest is remote or speculative is also a relevant factor that needs to be taken into account.
>
> As I have said, private interest is not limited to a pecuniary or economic advantage. It can include any real or tangible benefit that enures to the personal benefit of the Member.
>
> Whether campaign contributions and assistance are described as pecuniary or non-pecuniary interests or some hybrid, given the circumstances leading to this complaint, it is necessary to consider them. Campaign contributions and assistance, whether financial or otherwise, can, in my opinion, in some circumstances, be a "private interest". I am conscious of the very real purpose and difference between these kinds of contributions and other kinds of pecuniary and non-pecuniary benefits that could pass to a Member. Indeed in

> our system of parliamentary democracy, campaign contributions and assistance are to be encouraged and fostered and must be seen in a positive light as an interest accruing not only to a political party but also to the public generally; it is thus an interest clothed with the public interest. Nevertheless, it would be wrong to deny that in some circumstances it is also an interest that accrues to individual candidates and is thus also a private interest. This is particularly the case where the financial contribution is specifically directed to the candidate even though it is payable to the party. It is also the case where the non-financial contribution or assistance is of particular benefit to the candidate. The non-financial contribution on behalf of a specific candidate (notwithstanding that it is also on behalf of the party that the candidate represents) can include an array of activities from distributing leaflets, knocking on doors, developing campaign strategies, public endorsements and fundraising. While these factors may constitute a "private interest", the mere receipt of a private interest does not constitute a breach of the Act for reasons which I set out below.

2. Commissioner Hughes then discusses Blencoe's activities and identifies five areas of concern. He finds, amongst other things, that Mr. Blencoe, as Minister, exercised an official power or function that had the appearance of being an inducement or incentive to cause the CVRD to move a project to the next stage of consideration and this in turn meant that any subsequent decisions would be made in "an environment of prior approval". He reviews the interaction of the persons involved in considerable detail and whilst accepting that the Minister's motives in making certain decisions were what he perceived to be in the public interest, Commissioner Hughes believed that the effect of them created a "reasonable perception that they must have been affected by the past favours done for the Minister by the proponents of the project". Throughout his Opinion, Commissioner Hughes again and again stresses that his Opinion is qualified by the facts. Repeatedly he uses terms such as "campaign contributions and assistance with a financial or otherwise <u>can</u>, in my opinion, <u>in some circumstances</u>, be a private interest." Repeatedly he uses the term "<u>in some</u>

> circumstances" and "in some circumstances, discussed in more detail below". Each case, he concludes, will have to be looked at and all the circumstances taken into consideration.

In my view, the facts in the *Blencoe* case are clearly distinguishable from those in the matter before me and though I subscribe to the legal principles as interpreted by Commissioner Hughes, the facts in the present case are in no sense identical or similar to those in *Blencoe*.

In my opinion, the sequence of events set out in the supporting documents demonstrates that the Minister's decision to contact Mr. Greenaway cannot be reasonably construed as a *quid pro quo* for assistance rendered in the past. The telephone calls to Mr. Greenaway appear to be an urgent call for assistance from a Minister facing an imminent deadline in making sizeable revisions to her Cabinet submission which was one involving a matter of very considerable public importance, it is suggested that the Minister in retaining Mr. Greenaway's services was bestowing a favour on him. It could equally be argued that Mr. Greenaway, in agreeing to coming to the rescue of a Minister facing an imminent deadline, was rendering rather than receiving a favour. The Minister contends that the contract was given to Greenaway & Associates on the basis of need, merit and geography and that no opportunity existed to institute a last-minute tendering process to try and find a local firm of communications consultants ready, willing and able at a moment's notice to undertake the work required at a lesser rate of remuneration. It may also be thought that for the preparation of a major policy speech and presentation, it would be wise to seek the expert assistance of a professional firm known to be in sympathy with the aims, aspirations and policies of the party in power.

Should this work have been performed by in-house public servants within Ms. Hawkins' Ministry? She tried that repeatedly and unsuccessfully. Was this failure the fault of anyone in particular? That is not an issue before me: suffice it to say that the speeches and presentation were to be delivered within days by the Minister and had to be drafted to the Minister's satisfaction. They were not drafted to the Minister's satisfaction. The responsibility for making that decision was the Minister's and her alone. Should the contract have gone to tender? There was no time for this. Is it suggested that there was some element of patronage involved? I am not satisfied that there was, but in any event, it must be remembered that political patronage in Canada is not prohibited provincially or federally and that its presence and acceptability are regarded as political issues properly left to the voters at election time.

Campaign Contributions and Assistance as Private Interest

In our system of parliamentary democracy, campaign contributions and assistance are to be encouraged and fostered and must be seen in a positive light as an interest accruing not only to a political party, but also to the public generally. I have in mind the careful analysis of this question in *Blencoe*. The mere receipt of a private interest does not constitute a breach of the Act. If it were otherwise, no citizen could ever make a campaign contribution at election time for any candidate or knock on door or stuff envelopes or answer telephones or drive the elderly to the polling booth without thereby risking possible disqualification from a variety of activities under the *Members' Conflict of Interest Act*. Each case must always be looked at individually and all the surrounding circumstances taken into account.

1. On the basis of the evidence before me, I find that when Ms. Hawkins appointed Mr. Greenaway or his company for specified confidential work in the communications field, she was exercising an official power. I find further that in the exercise of that power, she did not have the opportunity to further her private interest.

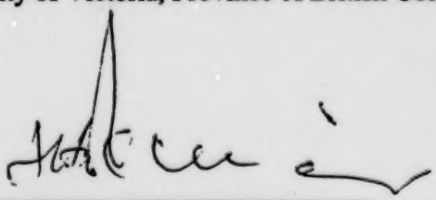
2. I find that a previously uninformed member of the public could have a perception that a minister exercising a power to appoint a person to perform communications duties of the type involved here, where the appointee had at some stage done volunteer work for the Minister at election time and had purchased, directly or through his or her company, tickets for fundraising dinners, could form a suspicion that the Minister's ability to exercise her official power might have been affected by her private interest, but I further find that the member of the public upon becoming reasonably well informed as to the facts now before me could not form a reasonable perception that the Minister's ability to exercise her official power must have been affected by her private interest. I accordingly find that Minister Hawkins was not in a conflict of interest within the meaning of Section 2(1), nor in an apparent conflict of interest within the meaning of Section 2(2) and did not commit an infraction of Section 3 of the *Members' Conflict of Interest Act*. Notwithstanding my opening remarks about the nature of the application before me, I find that as a request for an opinion under Section 19(1), it was properly brought.

Closing Comment

I once again venture to remind all Members of the constant availability of this Office for consultation and advice, formal or informal, on any matter involving the activities or proposed activities of Members of the Legislative Assembly.

Dated this 28th day of February, 2002

In the City of Victoria, Province of British Columbia



The Hon. H.A.D. Oliver, Q.C.
Conflict of Interest Commissioner